Supreme Court, U.S.
FILED
01 851 NOV 04 2001
OFFICE OF THE CLERK
No. 01-

IN THE

SUPREME COURT OF THE UNITED STATES

DEBORAH S. PALAC,

Petitioner,

v.

GARY R. SMITH and PRECISION ELECTRIC, INC.,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Ohio

PETITION FOR A WRIT OF CERTIORARI

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29 pp

QUESTION PRESENTED

Whether the Due Process Clause of the Federal Constitution prohibits a state court from applying procedural rules in a manner that, without fair notice, deprives a plaintiff of her opportunity to appeal on a state law claim?

PARTIES

The parties to this proceeding are set forth in the caption.

TABLE OF CONTENTS

Page

Question Presented i

Parties ii

Table of Authorities v

Opinions Below 1

Jurisdiction 1

Constitutional Provision, Code and Rules Involved 1

Statement of the Case 2

Reasons for Granting the Writ 6

I. There is a conflict of decisions among the states respecting the proper practice with regard to the use of the substance and form analysis when time tolling provisions are affected 6

II. The lower court ruling was erroneous since it left the Petitioner without proper due process notice or fair warning of when her notice of appeal ought to have been filed 8

III. This case raises an important due process of law issue 10

Conclusion 13

Appendix A: 1a

Appendix B: 2a

Appendix C: 7a

Appendix D: 8a

TABLE OF AUTHORITIES

Page(s)

CASES:

Barr v. City of Columbia, 378 U.S. 146 (1964) 11

Board of Regents of State Colleges, et al. v. Roth, 408 U.S. 564 (1972) 12

Browder v. Director, Ill. Dep't of Corrections, 434 U.S. 257 (1978) 9

Carr v. Bett, 970 P.2d 1017 (1998) 7

Connecticut, et al. v. Doehr, 501 U.S. 1 (1991) 13

DBSI/TRI V, et al. v. Bender, et al., 948 P.2d 151 (1997) 7

Dozier v. Ingram Barge Co., 706 So.2d 1064 (1998) 7

Goodman v. Lukens Steel Co., et al., 482 U.S. 656 (1987) 12

INB Nat'l Bank v. Moran Elec. Serv., Inc., 608 N.E.2d 702 (1993) 7

In re Nomination Petition of Johnson, 516 A.2d 1290 (1985) 7

Lane Bank Equip. Co. v. Smith S. Equip., Inc., 10 S.W.3d 308 (2000) 7

Table of Authorities continued

Page(s)

Logan v. Zimmerman Brush Co., et al., 455 U.S. 422 (1982) 9, 11, 13

Manufacturers Mut. Ins. Co., et al. v. Sullivan, 526 U.S. 40 (1999) 11, 12

Michigan v. Long, 463 U.S. 1032 (1977) 11

Montgomery Ward & Co. v. Duncan, 311 U.S. 243 (1940) 10

Morse v. United States, 270 U.S. 518 (1925) 8

Mullane v. Central Hanover Bank & Trust Co., et al., 339 U.S. 306 (1950) 12

Perez-Perez v. Popular Leasing Rental, Inc., 993 F.2d 281 (1st Cir. 1993) 9

Pitts v. Ohio Dep't of Transp., 423 N.E.2d 1105 (1981) 11

Quinn v. Millsap, 491 U.S. 95 (1989) 11

Southern Maine Properties Co. v. Johnson, 724 A.2d 1255 (1998) 7

Strucki v. State of Florida, 365 So.2d 222 (1978) 7

Tennessee Farmers Mut. Ins. Co. v. Farmer, 970 S.W.2d 453 (1998) 7

Table of Authorities continued

Page(s)

OTHER AUTHORITIES:

U.S. CONST. amend. XIV, § 1 ..... *passim*

28 U.S.C. § 1257 1

OHIO REV. CODE § 2307..... 2

OHIO R. CIV. P. 6(D) 4

OHIO R. CIV. P. 59(B) ..... *passim*

OHIO R. APP. P. 4(B)(2) ..... *passim*

MISCELLANEOUS:

Baldwin's Civil Practice, Judgment 624-625, § AT 59-41 (1999) 3, 4

Petitioner Deborah S. Palac respectfully prays that this Court grant a writ of certiorari to review the entry of the Supreme Court of Ohio entered on September 5, 2001.

OPINIONS BELOW

The September 5, 2001 entry of the Supreme Court of Ohio, which is not officially reported, is set out at p. 1a of the Appendix to this petition. The April 23, 2001 memorandum opinion of the court of appeals, which is not officially reported, is set out at pp. 2a-6a of the Appendix. The judgment entry thereon is set out at p. 7a of the Appendix. The October 31, 2000 judgment entry of the court of common pleas, which is not officially reported, is set out at p. 8a of the Appendix.

JURISDICTION

The Supreme Court of Ohio entered its entry on September 5, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION, CODE AND RULES INVOLVED

Section One of the Fourteenth Amendment of the Federal Constitution states in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ohio Rule of Civil Procedure 59, NEW TRIALS, states in pertinent part, "(B) Time for motion. A motion for a new trial shall be served not later than fourteen days after the entry of the judgment."

Ohio Rule of Appellate Procedure 4, APPEAL AS OF RIGHT -- WHEN TAKEN, states in pertinent part:

> (B) Exceptions. The following are exceptions to the appeal time period in division (A) of this rule: . . . (2) Civil . . . post-judgment motion. In a civil case . . . if a party files a timely motion for . . . a new trial under Civ. R. 59(B) . . . the time for filing a notice of appeal begins to run as to all parties when the order disposing of the motion is entered.

STATEMENT OF THE CASE

On November 5, 1991, the Plaintiff-Petitioner Deborah S. Palac ("Petitioner") was seriously and permanently injured as a result of the tortious negligence of Defendants-Respondents Gary R. Smith and Precision Electric, Inc. ("Respondents"), whose truck failed to yield the right of way and crashed into her car.

On November 4, 1993 and on July 22, 1996, the Petitioner filed and re-filed a state law cause of action against the Respondents pursuant to OHIO R. CIV. P. 41(A)(1) and OHIO REV. CODE § 2307, alleging the tort of negligence during the course, scope, or authority of employment or agency.

On May 1, 2000, the case proceeded to jury trial. The jury returned a verdict in favor of the Petitioner, and judgment on the verdict was entered on May 5, 2000. The Petitioner was very disappointed in the amount of the verdict since it was barely enough to cover her medical and legal

bills to date, and she was worried since she could not provide for her future medical care with the inadequate amount of the verdict.

Shortly thereafter, Respondents contacted Petitioner wanting a reduction in the jury's verdict, making reference to a letter, written some six years earlier, in which one of Petitioner's former attorneys, who had not individually signed a contract of employment with the Petitioner, agreed to reimburse the Heritage Insurance Company regarding a subrogation claim.

Petitioner was in the process of looking for this letter and its exact terms when Respondent filed a pleading entitled "motion for credit against the jury verdict or for remittur" [sic]. This pleading was served on the Petitioner on the fourteenth day after the entry of the jury's verdict, May 19, 2000.

Remittitur is a special form of motion for new trial seeking to reduce the amount of awarded damages. A motion for remittitur must be served within fourteen days of the entry of the judgment, and falls within the ambit of OHIO R. CIV. P. 59. OHIO R. APP. P. 4(B)(2) then operates to toll the time within which to file a notice of appeal until the court rules on the remittitur motion.[1]

The trial court set a hearing on Respondents' "motion for credit against the jury verdict or for remittur" on July 20, 2000. Seven days before the hearing, on July 13, 2000,

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[1] *Baldwin's Civil Practice*, Judgment 624-625, § AT 59-41 (1999) Timing of Service states:

> Rule 59(B) requires the motion to be served within fourteen days of the judgment entry. This time limit cannot be extended by the trial court or by the parties. The trial court is prohibited from considering or entertaining a motion for a new trial served later than the time allowed. Further if the motion for a new trial is not timely made, it does not suspend the running of the time for filing a notice of appeal. . . .

Petitioner served and filed her opposition to the motion for remittitur in accordance with OHIO R. CIV. P. 6(D).[2]

Petitioner's opposition contained its own motion for new trial and she entitled it "opposition to defendants' motion for remittitur; plaintiff's motion for additur or new trial solely on the issue of damages as an alternative to defendant's motion for remittitur."

Such an opposition is not governed by the fourteen day time limit for service in OHIO R. CIV. P. 59 because it is an assertion for a new trial contained within an opposition. According to *Baldwin's Civil Practice*, such a pleading is subject to the time limits imposed for filing and service of briefs in response to motions made by an opposing party.[3]

Several days before the hearing, Respondents requested that the hearing be taken off calendar, and the hearing was rescheduled and conducted on August 25, 2000.

On October 31, 2000, the trial court made its dispositive ruling granting Respondents' motion, allowing a $2,000 reduction of the verdict. In its judgment entry, the trial court refers to Respondents' pleading as a "motion for

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[2] Ohio Rule of Civil Procedure 6, TIME, states in pertinent part, "(D) Time: motions. A written motion . . . and notice of the hearing thereof shall be served not later than seven days before the time fixed for the hearing . . . ."

[3] *Baldwin's Civil Practice*, Judgment 624-625, § AT 59-41 (1999) Timing of Service states:

> The time limit on the service of a motion does not preclude a party from arguing, in a brief in opposition, made outside the time limit of the Rule . . . that, as an alternative to not denying the Rule 59(B) . . . motion, the court should order a new trial. An argument for a new trial contained in a brief responding to an opposing party's motion . . . is not a true Rule 59 motion. Such an assertion in a reply brief is subject to the time limits imposed by local rules of court on the service and filing of briefs in response to motions by an opposing party. . . .

credit against the jury's verdict." The trial court refers to Petitioner's pleading as a "motion for new trial and/or additur," and denied it as being untimely filed. (App. 8a).

On November 30, 2000, Petitioner filed her notice of appeal, within thirty days of the October 31, 2000 trial court ruling.

On April 23, 2001, the court of appeals dismissed Petitioner's appeal as being untimely filed since it ruled that the "true nature" of Respondents' "motion for credit against jury verdict or for remittur [sic]" was a motion for credit. (App. 2a-7a).

On June 6, 2001, Petitioner filed her memorandum in support of jurisdiction with the Supreme Court of Ohio, pursuant to the Constitution of Ohio and the Federal Constitution, setting forth the denial of protection of due process of law since she was without proper notice of when else she could have filed her notice of appeal.

On September 5, 2001, the Supreme Court of Ohio declined jurisdiction to hear the case and dismissed Petitioner's appeal as not involving any substantial constitutional question. (App. 1a).

In summary, Petitioner has a state law cause of action that she wishes to pursue by filing her notice of appeal. However, because of the way Respondents filed their ambiguously worded motion and because of the way that the lower courts treated this motion, Petitioner was deprived of her opportunity to appeal on a state law claim.

Under the rules of the state, if the Respondents' motion was a motion for remittitur, it would toll the time for appeal. The Respondents then said their motion was not a remittitur. The lower courts then said it was not a remittitur. When the Petitioner filed her notice of appeal, it was deemed to be untimely, the courts saying, in effect, that the tolling did not count.

REASONS FOR GRANTING THE PETITION

The use of a substance and form analysis in motion and pleading practice has become prevalent among the states. However, there are factions among the states regarding when and how to implement such an analysis, especially when time tolling provisions are implicated. Since few decisions from this type of practice receive appellate review, this case presents a timely opportunity for this Court to provide guidance. Moreover, the decision below is erroneous, and raises an important due process of law issue.

I. There is a conflict of decisions among the states respecting the proper practice with regard to the use of the substance and form analysis when time tolling provisions are affected.

The practice of examining moving papers, pleadings, and claims with a substance and form analysis has become a widespread practice among the states. Since this is an analysis that takes place mostly within the pleading and motion practice, the decisions that are made by the trial court are usually of an unreported nature and rarely reach the level of appellate review, even though they are often outcome determinative. Yet, the inconsistencies among the states in utilizing this analysis are evident from those cases that have been reported that address this issue.

In the instant case, the lower court held to a substance-controls-title rule even though the Respondents' motion for remittitur has procedural significance beyond the merits of its substance. In holding to this substance over form analysis, the lower court denied notice to the Petitioner that is guaranteed by due process of law protection. This decision underscores the conflict among the states over when

and how a substance and form analysis is appropriate when time tolling provisions are affected. (App. 2a-7a).

The State of Ohio ruling expressly conflicts with the Supreme Court of Montana which has never denied jurisdiction based on a post-trial Rule 59 motion that has been properly labeled but does not include substantive language in support of its label. *Carr v. Bett*, 970 P.2d 1017, 1022 (1998).

In *Carr v. Bett*, the Supreme Court of Montana specifically held that when a motion is identified and titled pursuant to Rule 59, it will not analyze the substance of the motion because to do so "would mean that a party who has filed a Rule 59" motion could "never be confident that it fell within the framework of Rule 59" with its tolling provision. It reasoned that to do so would mean that there would always be a "looming possibility" that the subsequent appeal could be dismissed if examined under a "judicial microscope." *Id.*

On the contrary, the States of Idaho, Louisiana and Pennsylvania have used a similar form and substance analysis in a manner that has denied tolling provisions.[4]

On the other hand, the States of Florida, Indiana, Maine, Tennessee, and Texas have applied the substance over form examination to decide that certain motions will confer time tolling provisions.[5]

A decision from this Court holding that pleadings that have procedural significance founded in the Due Process Clause beyond the merits of their content cannot be

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[4] *DBSI/TRI V, et al. v. Bender, et al.*, 948 P.2d 151 (1997); *Dozier v. Ingram Barge Co.*, 706 So.2d 1064 (1998); *In re Nomination Petition of Johnson*, 516 A.2d 1290, 1292 (1985).

[5] *Strucki v. State of Florida*, 365 So.2d 222 (1978); *INB Nat'l Bank v. Moran Elec. Serv., Inc.*, 608 N.E.2d 702 (1993); *Southern Maine Properties Co. v. Johnson*, 724 A.2d 1255 (1998); *Tennessee Farmers Mut. Ins. Co. v. Farmer*, 970 S.W.2d 453 (1998); *Lane Bank Equip. Co. v. Smith S. Equip., Inc.*, 10 S.W.3d 308 (2000).

subjected to a substance over form analysis could resolve some of the conflicts that exist among the states.

For systemic and economic reasons, securing appellate review within a motion and pleading practice on the substance and form issue is difficult. Therefore, this case presents a good opportunity for this Court to clarify the Due Process Clause protections of citizens who are faced with inconsistent and often ad hoc applications of a substance and form analysis that may inhere lesser rights than are guaranteed by the Federal Constitution. (App. 2a-7a).

II. The lower court ruling was erroneous since it left the Petitioner without proper due process notice or fair warning of when her notice of appeal ought to have been filed.

Although it is accurate to contend that a motion for credit does not act to toll appellate timelines, this is not the case regarding a motion for remittitur that is served on an opponent on the fourteenth day after entry of judgment, and is governed by OHIO R. CIV. P. 59 and OHIO R. APP. P. 4(B)(2).

There can be no doubt that "a duly and seasonably filed" motion for remittitur "suspends the running of the time for . . . an appeal," and that the time within which one has to file her notice of appeal "begins from the date" of the ruling on that motion. *Morse v. United States*, 270 U.S. 518, 519 (1925).

The Petitioner was denied the protection of due process of law and proper notice when the lower courts resorted to a "substance over form" analysis or "true nature" construction of Respondents' motion for remittitur, and thereby dismissed Petitioner's notice of appeal as being untimely. U.S. CONST. amend. XIV, § 1.

When the lower courts decided not recognize the OHIO R. CIV. P. 59 label and service of Respondents' moving

papers, the tolling provision of OHIO R. APP. P. 4(B)(2) became inapplicable with the prejudicial result that Petitioner's notice of appeal was deemed to be untimely filed, and her appeal dismissed. *Compare Browder v. Director, Ill. Dep't of Corrections*, 434 U.S. 257, 261 (1978) (holding that respondent's neglect to label his motion resulted in its loss of Rule 59's tolling treatment).

This decision by the lower courts is erroneous since it prejudiced the Petitioner by eliminating the basis for her timely notice of appeal, and denied her of due process notice of when her appeal could be timely filed. Further, this denial violates due process because the Petitioner was not given fair warning that the appellate tolling rule would not apply. At a minimum due process of law requires that the Petitioner be given notice of when to file her notice of appeal. *Logan v. Zimmerman Brush Co., et al.*, 455 U.S. 422, 428 (1982).

Moreover, the lower courts have essentially accepted the argument of Respondents that they used a term they did not intend to use in their timely served motion for remittitur. However, Petitioner had no other choice but to rely upon the plain language of opposing counsel in calculating the timeliness for filing her notice of appeal. Surely, it must be presumed that before opposing counsel files moving papers that any legal terminology has been chosen, researched, dictated, proof read, and a signature affixed thereto.

Further, remittitur is a term in the law that speaks for itself and "is a classic Rule 59 claim." *Perez-Perez v. Popular Leasing Rental, Inc.*, 993 F.2d 281, 283 (1st Cir. 1993). It was not foreseeable to the Petitioner that the Respondents did not intend to use the legal language that they themselves selected. Therefore, it is reasonable that the Petitioner relied upon the Respondents' use of the remittitur language, in their alternatively styled motion, as a means under these circumstances to spring the tolling provision of OHIO R. APP. P. 4(B)(2) when timing her notice of appeal. *See, e.g., Montgomery Ward & Co. v. Duncan*, 311 U.S. 243,

251 (1940) (recognizing that each motion in an alternatively styled motion has its own office).

As a result, an anomalous situation has arisen in which the sins of the Respondents have been visited upon the Petitioner, who has been prejudiced and denied appellate review on the merits of her appeal.

Additionally, the Petitioner does not know at what other time she could have filed her notice of appeal without causing serious logistical problems, such as transmission of a record to the court of appeals that was not yet complete, or setting in motion a briefing schedule while hearings in the trial court were still taking place.

The erroneous decision made by the lower courts in this case underscores the importance of using extreme caution when utilizing a substance and form analysis, especially when doing so confers lesser due process rights than that guaranteed by the Federal Constitution. U.S. CONST. amend. XIV, § 1.

Since Respondents' motion for remittitur affected the Petitioner's judgment of when to file her notice of appeal, it was prejudicial error for the lower courts to dismiss Petitioner's appeal as being untimely filed. Ultimately, the lower court decision deprived the Petitioner of property, that is her state law cause of action, without fair warning or due process of law. *Id.*

III. This case raises an important due process of law issue.

At the outset, as an important and unresolved question of law, it cannot it be argued that the State of Ohio has an independent and adequate state ground for its decision that would preclude this Court's review of the due process issue raised in this case.

First, there is no plain statement from the state court that it was relying on a state law ground as an independent

basis for its decision. *Michigan v. Long*, 463 U.S. 1032 (1977).

In *Quinn v. Millsap*, this Court refused to find an independent or adequate state ground when there was no express statement from the state court that its judgment was based on state law grounds. 491 U.S. 95 (1989).

Second, the substance over form analysis that was applied in the instant case is inconsistently followed by the state court. In fact, the Supreme Court of Ohio has stated that complications concerning appeal timeliness and of having to inspect mislabeled motions to decipher form over substance should be avoided. *Pitts v. Ohio Dep't of Transp.*, 423 N.E.2d 1105, 1108 (1981).

This Court has stated that "state procedural requirements which are not strictly or regularly followed cannot deprive us of the right to review." *Barr v. City of Columbia*, 378 U.S. 146, 149 (1964).

The initial inquiry in every due process challenge is whether the Petitioner has been deprived of a constitutionally protected interest in property or liberty caused by state law, fairly attributable to the state. *Manufacturers Mut. Ins. Co., et al. v. Sullivan*, 526 U.S. 40, 59 (1999).

In the instant case, the Petitioner has a statutorily created and protected property interest for purposes of the Due Process Clause in her state law cause of action that resulted from the tortious negligence of the Respondents. Moreover, the rules of civil procedure are a right or privilege created by the state. It is undisputed that a legal cause of action constitutes a "species of property protected by the Fourteenth Amendment's Due Process Clause." *Logan v. Zimmerman Brush Co., et al.*, 455 U.S. 422, 428 (1982).

The Petitioner has been deprived of property within the meaning of the Due Process Clause of the Fourteenth Amendment since the "substance over form" analysis conducted in the court below did not comply with due process of law guarantees The Petitioner was denied notice

of when she could timely file her notice of appeal, and thereby deprived of the opportunity to appeal.

After finding that the deprivation of a protected interest has taken place, this Court will "look to see if the state's procedures comport with due process." *Manufacturers Mut. Ins. Co., et al. v. Sullivan*, 526 U.S. 40, 59 (1999).

This Court has previously held that a state cannot apply its procedural rules to preclude a fair hearing of a federal claim in circumstances where these state rules fail to provide adequate notice to the party. *Mullane v. Central Hanover Bank & Trust Co., et al.*, 339 U.S. 306 (1950).

The same analysis must apply even if the underlying claim is a state law claim because it is the same theory, that is that the Petitioner had a cause of action created by state law that is a kind of property interest protected by the Due Process Clause, and the state holds out the rules of procedure of how to process an appeal. *Board of Regents of State Colleges, et al. v. Roth*, 408 U.S. 564, 577 (1972).

In this case, the Petitioner followed the state's rules of procedure in processing her appeal. However, the state resorted to a substance over form analysis that, in effect, suspended the operation of the civil rules of procedure when deciding not to treat the Respondents' motion as remittitur. On that basis the state denied Petitioner's notice of appeal as untimely. (App. 2a-7a).

In the analogous case of *Goodman v. Lukins Steel Co., et al.*, the opportunity to bring a lawsuit had been unfairly lost by the petitioners. This Court considered the constitutionality of a retroactive change in the statute of limitations, and concluded that a two year statute of limitations could be retroactively applied since there was no clear precedent on which petitioners could have relied when they filed their complaint. 482 U.S. 656, 657 (1987).

Likewise, the Petitioner unfairly lost the opportunity to timely file her notice of appeal when she relied on the

remittitur language of the Respondents. The Petitioner was not given fair warning of notice that the tolling rule would not apply. Ohio's substance over form standard is unclear and inconsistently followed, so it failed to provide notice, and the requirements of due process were violated. *Connecticut, et al. v. Doehr*, 501 U.S. 1, 18 (1991).

Because the Petitioner's cause of action counts as a species of property she was deprived of property within the meaning of the Due Process Clause. *Logan v. Zimmerman Brush Co., et al.*, 455 U.S. 422, 423 (1982).

Finally, this case raises the general issue of due process guarantees since the Petitioner suspects that there are other individuals, similarly situated, for whom statutory rules are applied or misapplied in ways that affect their interests that are antithetical to the Due Process Clause. U.S. CONST. amend. XIV, § 1.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the entry of the Supreme Court of Ohio.

Respectfully submitted,

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APPENDIX

APPENDIX A

The Supreme Court of Ohio

FILED
SEP 05 2001
Marcia J. Mengel, Clerk
Supreme Court of Ohio

Deborah S. Palac,	:	Case No. 01-1040
Appellant,	:	
v.	:	**ENTRY**
Gary R. Smith, et al.,	:	
Appellees.	:	

Upon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case and dismisses the appeal as not involving any substantial constitutional question.

COSTS:

Docket Fee, $40.00, paid by Lois L. Miller, Esq.

(Trumbull County Court of Appeals; No. 2000T0147)

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

[SEAL]

APPENDIX B

COURT OF APPEALS
ELEVENTH DISTRICT
TRUMBULL COUNTY, OHIO

FILED
Court of Appeals
APR 23 2001
Trumbull County, Ohio
Margaret R. O'Brien, Clerk

JUDGES

Deborah S. Palac,

Plaintiff-Appellant,

HON. DONALD R. FORD, P.J.,
HON JUDITH A. CHRISTLEY, J.,
HON. DIANE V. GRENDELL, J.

-vs-

Gary R. Smith, et al.,

Defendants-Appellees.

CASE NO. 2000-T-0147

MEMORANDUM OPINION

CHARACTER OF PROCEEDINGS: Civil Appeal from the Court of Common Pleas Case No. 96 CV 1233

JUDGMENT: Appeal dismissed.

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GRENDELL, J.

The above-captioned case comes before this court to address appellees' motion to dismiss appellant's appeal of the May 5, 2000 judgment by the Trumbull County Court of Common Pleas. The following circumstances are relevant for our determination of this motion.

On May 5, 2000, a judgment on the verdict was filed in favor of Deborah S. Palac ("appellant"), against defendants, Gary R. Smith and Precision-Electric ("appellees"). Appellant was awarded the sum of $75,000, arising out of a complex civil litigation involving personal injury resulting from an automobile accident.

On May 19, 2000, appellees filed a "Motion for Credit Against Jury Verdict or for Remittur" [sic]. Appellees moved the court for a credit of $2,000 against the $75,000 general verdict. Appellees asserted that a $2,000 payment was made prior to trial by appellees' insurance carrier to Westfield Insurance Company ("Westfield"). This payment satisfied a subrogation claim by Westfield regarding medical benefits payments that were made to appellant after the automobile accident. An agreement was entered into between counsel for both sides by which the satisfaction of the claim would result in a $2,000 credit against any jury verdict that would be awarded to appellant after trial. Attached to appellees' motion were two letters, which reflected this agreement, a copy of a general release signed by Westfield absolving appellees from any claims and liabilities arising out of the automobile accident, and a copy of a check issued to Westfield.

On July 13, 2000, appellant filed an "Opposition to Defendants' Motion for Remittitur; Plaintiff's Motion for

Additur or New Trial Solely on the Issue of Damages as an Alternative to Defendant's [sic] Motion for Remittitur."[1]

On October 31, 2000, a judgment entry was filed by the trial court denying appellant's motion because it was untimely filed and presented no evidence to justify additur or a new trial. However, the trial court granted appellees' motion. Specifically, the court found that an agreement was entered into between counsel for both sides concerning a $2,000 credit against the verdict. In this judgment entry, the trial court described appellees' motion as a "Motion for Credit Against the Jury's Verdict."

On November 30, 2000, appellant filed a notice of appeal with this court appealing the judgment entries of May 5, 2000 and October 31, 2000. On January 18, 2001, appellees filed a motion to dismiss appellant's appeal as to the May 5, 2000 judgment entry because it was not filed within the thirty-day requirement. Appellees contend that appellant's time to appeal the May 5, 2000 judgment entry was not extended by her motion for a new trial or additur because that motion was also untimely filed.

In response, appellant submitted a memorandum opposing the motion to dismiss. Appellant maintains that her appeal time for the May 5, 2000 judgment entry did not commence until after the trial court's October 31, 2000 judgment entry, which disposed of the parties' motions. Appellant claims that appellees' motion for remittitur, pursuant to Civ. R. 59, tolled the time to appeal until October 31, 2000 when the trial court ruled on that motion.

In rebuttal, appellees submitted a brief asserting that their motion was not a request for remittitur even though the

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[1] Civ. R. 59(B) requires a motion for new trial or additur to be filed within fourteen (14) days of the judgment.

word was used in the caption. Rather, appellees assert that the substance of their motion did not use the word "remittitur"; rather, it was directed solely to requesting the trial court to grant the $2,000 credit against verdict pursuant to the prior agreement of the parties.

App. R. (4)(A) establishes a thirty-day deadline for filing a notice of appeal. Nevertheless, App. R. 4(B)(2) allows for the tolling of the time to file a notice of appeal when a party files a timely motion pursuant to Civ. R. 59. Civ. R. 59(B) provides that "[a] motion for new trial shall be served no later than fourteen days after the entry of the judgment." Remittitur and additur are special motions for a new trial on the issue of damages. Providing the prevailing party at trial consents, a trial court may grant a remittitur, which reduces the verdict to an amount warranted by the evidence, when the court finds that a verdict is excessive, but not influenced by passion or prejudice. *Moskovitz v. Mt. Sinai Med. Ctr.* (1994), 69 Ohio St.3d 638, 654.

In addition, when determining the underlying reason for a motion submitted to a trial court, this court and other appellate districts have looked to the substance or "true nature" of the motion, rather than, the form and caption of the motion as the controlling factor. *Chester Twp. v. Fraternal Order of Police* (1995), 102 Ohio App.3d 404, 407; *White v. Wong* (July 22, 1998), Scioto App. No. 97 CA 2552, unreported; *Peterson v. Peterson* (Apr. 6, 1998), Butler App. No. CA97-09-169, unreported; *Magee v. Aluminum Co. of America* (Sept. 22, 1988), Cuyahoga App. No. 54184, unreported.

In the case sub judice, appellees filed a post-judgment motion captioned "Motion for Credit Against Jury Verdict or for Remittur" [sic]. However, upon close examination of appellees' motion and the attached letters of

counsel by both sides, we conclude that the "true nature" of appellees' motion was purely a motion moving the trial court to grant a credit of $2,000 as agreed prior to trial. Similarly, the October 31, 2000 judgment entry of the trial court referenced appellees' motion as "Defendants' Motion for Credit Against the Jury's Verdict." Additionally, the trial court properly denied appellant's July 13, 2000 motion for additur or new trial on the grounds that it was untimely filed pursuant to Civ. R. 59(B).

Accordingly, pursuant to App. R. 4(A), appellant failed to file a timely notice of appeal with this court appealing the May 5, 2000 judgment. Appellant's notice was filed on November 30, 2000. Hence, appellees' motion to dismiss appellant's May 5, 2000 appeal is hereby granted.

Appeal dismissed.

/s/ Diane V. Grendell
JUDGE DIANE V. GRENDELL

FOR THE COURT

FORD, P.J.,

CHRISTLEY, J., concur.

FILED
Court of Appeals
APR 23 2001
Trumbull County, Ohio
Margaret R. O'Brien, Clerk

APPENDIX C

State of Ohio) IN THE COURT OF APPEALS
) SS
County of Trumbull) ELEVENTH DISTRICT

Deborah S. Palac,
Plaintiff-Appellant,

JUDGMENT ENTRY

-vs-

CASE NO. 2000-T-0147

GARY R. SMITH, et al.,
Defendants-Appellees.

For the reasons stated in the Memorandum Opinion of this Court, it is ordered that Appellees' motion to dismiss is hereby granted and the appeal is hereby dismissed.

Pursuant to this judgment entry, any pending motions are hereby overruled as moot.

/s/ Diane V. Grendell
JUDGE DIANE V. GRENDELL
FOR THE COURT

FILED
Court of Appeals
APR 23 2001
Trumbull County, Ohio
Margaret R. O'Brien, Clerk

APPENDIX D

IN THE COURT OF COMMON PLEAS
TRUMBULL COUNTY, OHIO

FILED
OCT 31 2000
Margaret R. O'Brien
Clerk of Courts
Trumbull County

Deborah S. Palac,	)	Case No. 1996-CV-1233
Plaintiff,	)	
vs.	)	JUDGE JOHN M. STUARD
Gary R. Smith, et al.,	)	
Defendant.	)	**JUDGMENT ENTRY**

This matter is before this Court on Plaintiff's Motion for New Trial and/or Additur and Defendants' Motion for Credit Against the Jury's Verdict.

Plaintiff's motion is not timely filed and otherwise has presented no evidence to justify an additur or basis for new trial. Plaintiff's Motion is therefore denied.

As to the two thousand dollar reduction or credit against the verdict Defendants' request in their Motion, this court finds that Attorney White did enter into such an agreement and the motion is granted.

Case is concluded.

/s/ John M. Stuard
JUDGE JOHN M. STUARD
10-30-00
Date

Supreme Court, U.S.
FILED
JAN 7 2002

(2)

No. 01-851

In the

Supreme Court of the United States

DEBORAH S. PALAC,

Petitioner,

versus

GARY R. SMITH and PRECISION ELECTRIC, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

BRIEF IN OPPOSITION FOR RESPONDENTS GARY R. SMITH and PRECISION ELECTRIC, INC.

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QUESTION PRESENTED

Whether the Due Process Clause of the Federal Constitution prohibits a state court from applying procedural rules in a manner that, without fair notice, deprives a plaintiff of her opportunity to appeal on a state law claim?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE PETITION 3

I. THE OHIO SUPREME COURT CONSIDERED PETITIONER'S CONSTITUTIONAL ARGUMENTS IN RELATION TO THE LOWER STATE COURTS' APPLICATION OF THE OHIO RULES OF CIVIL AND APPELLATE PROCEDURE AND FOUND NO CONSTITUTIONAL QUESTION EXISTED 3

II. THIS COURT SHOULD DECLINE TO REVIEW PETITIONER'S ARGUMENT CONCERNING WHETHER THE STATE TRIAL COURT'S OCTOBER 31, 2000 JUDGMENT VIOLATED HER DUE PROCESS RIGHTS AND WHETHER THE STATE INTERMEDIATE APPELLATE COURT'S APRIL 23, 2001 DISMISSAL OF HER APPEAL VIOLATED HER DUE PROCESS RIGHTS BECAUSE PETITIONER FAILED TO RAISE THOSE ISSUES IN THE STATE INTERMEDIATE APPELLATE COURT AND DID NOT FIRST RAISE THEM UNTIL ATTEMPTING TO APPEAL TO THE SUPREME COURT OF OHIO 9

CONCLUSION 10

TABLE OF AUTHORITIES

CASES:

BERRY V. DOLES, 438 U.S. 190, 98 S. CT. 2692, 57 L. ED. 2D 693 (1978) 10
CHAMBERS V. PINSON (1966), 6 OHIO APP. 2D 66 8
EDWARDS V. PASSARELLI BROS. AUTOMOTIVE SERVICE, INC. (1966), 8 OHIO ST. 2D 6 8
KAUFMANN V. PHILLIPS (1997), 120 OHIO APP. 3D 453 8
NELSON V. ADAMS USA, INC., NO. 99-502 (2000) 6
THOMPSON V. ELBERT (FEB. 21, 2001), SUMMIT APP. NO. 99CA007476, UNREPORTED 8
T.R.W. INC. V. ANDREWS, - U.S. -, 122 S. CT. 441, - L. ED. 2D - (2000) 9

CONSTITUTIONS:

U.S. CONST. AMEND XIV 4
OHIO CONST 5

MISCELLANEOUS AUTHORITIES:

OHIO APP. R. 4 1
OHIO CIV. R. 7(B) 5, 6
OHIO CIV. R. 8(C) 5
OHIO CIV. R. 12 5
OHIO CIV. R. 59 1,2,7,8
OHIO CIV. R. 60(B) 5

STATEMENT OF THE CASE

On May 5, 2000, a judgment on a jury verdict was rendered in favor of petitioner and against respondents. This judgment on the verdict was filed by the trial court--i.e., the Trumbull County [Ohio] Court of Common Pleas--following a civil trial in which petitioner recovered $75,000.00 for personal and bodily injury that she sustained in an automobile accident. Essentially, petitioner is attempting to appeal from the May 5, 2000 judgment on the verdict rendered in a state court of Ohio.

Petitioner did not file an appeal from the May 5, 2000 judgment on the verdict within 30 days of the entry of that judgment as required by Ohio Rule of Appellate Procedure 4. Rather, petitioner filed her notice appealing the May 5, 2000 judgment on the jury's verdict on November 30, 2000. The only post-trial motion filed by petitioner challenging the jury's verdict was a motion for a new trial filed pursuant to Ohio Rule of Civil Procedure 59, which motion was filed on July 13, 2000.

Respondents did file one post-trial motion. This motion was filed on May 19, 2000 and respondents specifically moved the state trial court for a $2,000.00 credit against the $75,000.00 jury verdict. Respondents' motion expressly moved the court only "for a credit in the amount of $2,000.00 against the $75,000.00 General Verdict in favor of the plaintiff . . . ."[1] Respondents were

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[1] Nowhere in their motion did respondents ask the trial court to grant them a remittitur or to exercise the discretion that would have been required of the trial court to grant a remittitur. Indeed, the only place that the word remittitur appeared in respondents' motion was in its caption: "Motion for Credit Against Jury Verdict or Remittur."

forced to file this motion because petitioner and her trial counsel would not honor a previous express agreement by petitioner's former counsel that respondents would receive a credit against any judgment due to an advance payment that satisfied the claim of a subrogated insurer.

On October 31, 2000, the state trial court ruled on the pending post-trial motions. The state trial court ruled that respondents were entitled to a $2,000.00 credit against the jury's verdict because of the express agreement entered into by petitioner's former counsel. The state trial court denied petitioner's July 13, 2000 motion for a new trial on the basis that it was not filed within 14 days of the entry of the judgment on the verdict as required by Ohio Rule of Civil Procedure 59 and, therefore, was untimely. The [Ohio] Eleventh District Court of Appeals on April 23, 2001 dismissed petitioner's November 30, 2000 appeal noting that petitioner's failure to timely file a motion for new trial made her November 30, 2000 attempt to appeal the May 5, 2000 entry of judgment on the verdict untimely as well. On September 5, 2001, the Supreme Court of Ohio filed its entry declining jurisdiction over petitioner's appeal from the state appellate court and in its entry the Supreme Court of Ohio expressly stated it "declines jurisdiction to hear the case and dismisses the appeal as not involving any substantial constitutional question."

Obviously, the word remittitur was misspelled in the only place that it appeared in respondents' motion.

REASONS FOR DENYING THE PETITION

Respondents state that there is no substantial constitutional Due Process Clause question involved in this case and that, instead, this case concerns well established Ohio state court civil post-trial and appellate practice and procedure. Respondents state that none of the rulings of the inferior state courts which petitioner attempts to challenge were in any way based upon constitutional principles. Respondents further state that, in petitioner's opposition to their motion to dismiss in the intermediate Ohio appellate court, petitioner never asserted that her procedural due process rights or any other constitutional rights were abridged. Respondents state that, rather, petitioner's assertion that a constitutional question existed was in conjunction with her attempt to appeal to the Ohio Supreme Court and was made to that court, just as it is to this court, for no purpose other than to enable petitioner to continue her efforts to appeal.

I. THE OHIO SUPREME COURT CONSIDERED PETITIONER'S CONSTITUTIONAL ARGUMENTS IN RELATION TO THE LOWER STATE COURTS' APPLICATION OF THE OHIO RULES OF CIVIL AND APPELLATE PROCEDURE AND FOUND NO CONSTITUTIONAL QUESTION EXISTED.

1. The petitioner's citation to the decisions of other states' courts and her allegation of an apparent conflict between these decisions and the decisions of the Ohio state courts in this case is specious. First, this is not a case which developed in the lower federal courts, to which the Federal Rules of Civil or Appellate Procedure were applied, or in which a conflict among the courts of different jurisdictions may have some import. Rather, this case was

litigated entirely under the jurisdiction of the state courts of Ohio and only the Ohio Rules of Civil and Appellate Procedure were applied. Given the circumstances, it is completely irrelevant whether another state's court applying that state's procedural rules may have reached a different result than the state courts of Ohio reached in this case. Further, petitioner has cited no precedent or legal authority, other than a general citation to the Due Process Clause of the Fourteenth Amendment, which would confer upon this court the power to review how each state's courts apply the state's civil and appellate procedural rules. Likewise, petitioner has cited no specific precedent or legal authority to establish just how alleged inconsistencies among the decisions of different state's courts necessarily mean that constitutional infirmity exists. Indeed, petitioner completely has failed to establish why the alleged differences on which she relies evidence a constitutional question that must be addressed by this court or that resulted from how the state courts of Ohio applied their procedural rules in petitioner's case against respondents. Given this failure by petitioner, her bald assertion that her due process rights were violated should be rejected and this court should decline to grant the Petition for a Writ of Certiorari.

2. Petitioner's assertion that the decision of the "lower court" was erroneous is equally spurious. No court directly inferior to this court has ruled in this case; rather, the Supreme Court of Ohio was presented with petitioner's constitutional challenge to the decisions of the lower Ohio state courts. Ultimately, the Supreme Court of Ohio considered the very argument advanced by petitioner in this case and rejected that argument determining that no substantial constitutional question was presented. Although petitioner now cites different legal authority in support of her claim, that authority is really no different than what was

considered by the Supreme Court of Ohio and petitioner's argument continues to ignore the relevant analysis.

Indeed, petitioner's entire argument--i.e., that her November 30, 2000 appeal from the state trial court's judgment on the jury's verdict entered on May 5, 2000 was timely because respondents filed a motion for remittitur--is meritless. The state intermediate appellate court applied well-established Ohio precedent to determine that petitioner's appeal was untimely and the Supreme Court of Ohio considered this precedent when concluding that petitioner presented no substantial constitutional question.

Petitioner's argument in this case demonstrates her continuing failure to appreciate that not every adverse decision in the litigation or in the Ohio state courts' interpretation and application of long-standing rules of procedure and trial practice violate a right guaranteed to her by the Ohio or U.S. Constitutions. For example, petitioner absolutely has ignored the numerous instances where the Ohio Rules of Civil Procedure manifest that it is the substance of the motion or pleading which determines the character of the proceedings.[2] Additionally, petitioner's argument about the constitutional impact of analyzing

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[2] Pursuant to Ohio Rule of Civil Procedure 12, a motion styled" "Motion to Dismiss," will be treated as a "Motion for Summary Judgment" if, due to the submission of extraneous material and evidence in support of the motion, its essential character is a motion for summary judgment. Similarly, Ohio Rule of Civil Procedure 8(C) specifically contemplates that pleadings denominated as "counterclaims," but which actually are affirmative defenses, shall be treated as such. Finally, the state courts of Ohio frequently have recognized that it is the substance of a matter filed with the trial court and not its title or styling that controls when considering whether motions for relief from judgment pursuant to Ohio Rule of Civil Procedure 60(B) are filed as an attempted substitute for a timely appeal.

respondents' post-trial motion for its "form" rather than its "substance" completely ignores that respondents simply could have styled their motion for credit against the jury's verdict as a "Motion" in accord with Ohio Rule of Civil Procedure 7(B). Fundamentally, petitioner is complaining to this court about how the state courts of Ohio applied their procedural and appellate rules. Petitioner fails to recognize, though, that how the Ohio state courts applied their rules did not deprive her of the opportunity to protect her post-judgment remedies and, therefore, did not deprive her of due process of law. Petitioner simply refuses to acknowledge that it was her own failure to timely file a motion for new trial or timely file an appeal from the jury's verdict that resulted in the loss of her opportunity to challenge the jury's verdict. Cf, Nelson v. Adams USA, Inc., No. 99-502 (2000).[3] Certainly, the Supreme Court of Ohio found no constitutional deficiency in how the lower

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[3] In Nelson, this court found that an individual's due process rights were violated by how a district court applied the Federal Rules of Civil Procedure. The district court permitted a pleading to be amended to allege personal liability against a corporate officer and shareholder who was not previously a party to the litigation and, more importantly, permitted judgment to be rendered immediately against the individual upon the amendment of the pleading. This court held that the absolute denial of the individual's right to defend against the amended claims was a violation of his due process rights. Conversely, the lower state courts' decisions in this case did not absolutely deny petitioner any right to protect her interests. Instead, the lower state courts' decisions only confirmed that petitioner had failed to timely protect her rights and, essentially, had waived any post-judgment recourse. Indeed, the fallacy of petitioner's argument is demonstrated by the fact that respondents' motion simply could not have influenced in any way petitioner's decision to not timely file a motion for new trial since respondents' motion was not filed until late on the 14th day after the entry of judgment on the jury's verdict. Similarly, the timing of the filing of respondents' post-trial motion nonetheless left petitioner with more than two weeks to file a notice of appeal had petitioner ever been intent on appealing the jury's verdict.

state courts interpreted and applied the rules of civil and appellate procedure that it had promulgated.

3. Ultimately, this case does not raise an important due process of law issue. Petitioner does not constitutionally challenge the Ohio Rules of Civil or Appellate Procedure as promulgated or the Ohio Supreme Court's constitutional authority to promulgate such rules. Instead, petitioner complains only of how the state courts of Ohio applied their procedural and appellate rules and complains that her constitutional rights were violated because that is the only way for her to gain this court's attention. However, just as the Supreme Court of Ohio rejected petitioner's subterfuge, so should this court.

Essentially, the only post-trial motion filed by petitioner directly challenging the jury verdict or the state trial court's entry of judgment on the verdict was filed on July 13, 2000, which was 59 days after the entry of judgment on the verdict and patently untimely pursuant to Ohio Rule of Civil Procedure 59. Due to this failure and her corresponding failure to file a Notice of Appeal with the intermediate state appellate court within 30 days of the filing of the May 5, 2000 entry of judgment on the verdict, petitioner's only hope of pursuing an appeal was to argue that respondents' one post-judgment motion extended her time to appeal until the state trial court ruled on this post-judgment motion. Fundamentally, petitioner's argument is that respondents' motion, which was filed on the 14th day after the entry of judgment on the verdict, extended every possible deadline for post-judgment relief or activity that was imposed upon her. Unfortunately for petitioner, though, respondents' motion did not extend her time to appeal.

Respondents' post-trial motion was directed solely to having the court grant a credit against the jury's verdict in an amount equal to what the parties had agreed several years prior to the trial of the case. Essentially, the credit was due to respondents because of an advance payment made on behalf of petitioner in satisfaction of a subrogation claim and was due in accord with a 1994 written agreement with petitioner's then-counsel. The courts of Ohio have long recognized that credits for advance payments are the proper subject of post-judgment reduction or set-off against judgments. Edwards v. Passarelli Bros. Automotive Service, Inc. (1966), 8 Ohio St. 2d 6; Chambers v. Pinson (1966), 6 Ohio App. 2d 66; Kaufmann v. Phillips (1997), 120 Ohio App. 3d 453; Thompson v. Elbert (Feb. 21, 2001), Summit App. No. 99CA007476, unreported.

Ohio law has never considered a motion for credit against a judgment to be made pursuant to Ohio Rule of Civil Procedure 59 nor has such a motion ever been subject to the 14 day filing requirement of Ohio Rule of Civil Procedure 59. Moreover, petitioner has never challenged this legal authority in this case and has never argued that a credit against the jury's verdict, per se, violates her due process rights. Again, petitioner's real quarrel is with how the state courts of Ohio have interpreted their procedural and appellate rules in accord with the applicable authority, but petitioner has offered no sensible or meritorious explanation of how this interpretation violated her constitutionally protected due process rights.

Petitioner's efforts to persuade this court to ignore the fact that not every post-judgment or post-trial motion extends a party's time to appeal must be rejected. Petitioner's efforts to persuade this court that the Ohio Rules of Civil and Appellate Procedure and the authority

interpreting those rules should be ignored so that she can pursue an appeal in a situation where she otherwise did not protect her rights also must be rejected. Petitioner's efforts to establish that she was mislead into not protecting her rights and that some constitutional violation occurred could not be farther from the truth. Indeed, petitioner's efforts completely fail to recognize that the only reason that respondents' post-trial motion was necessary was because she and her trial counsel refused to honor an express and irrefutable agreement between the parties and, under the circumstances, petitioner's efforts to profit from this conduct must be rejected. Ultimately, petitioner's contentions in this case are the worst kind brought before this court--completely devoid of any genuine constitutional significance and designed only to perpetuate litigation which should have been concluded long ago.

II. THIS COURT SHOULD DECLINE TO REVIEW PETITIONER'S ARGUMENT CONCERNING WHETHER THE STATE TRIAL COURT'S OCTOBER 31, 2000 JUDGMENT VIOLATED HER DUE PROCESS RIGHTS AND WHETHER THE STATE INTERMEDIATE APPELLATE COURT'S APRIL 23, 2001 DISMISSAL OF HER APPEAL VIOLATED HER DUE PROCESS RIGHTS BECAUSE PETITIONER FAILED TO RAISE THOSE ISSUES IN THE STATE INTERMEDIATE APPELLATE COURT AND DID NOT FIRST RAISE THEM UNTIL ATTEMPTING TO APPEAL TO THE SUPREME COURT OF OHIO.

This court has a long tradition of refusing to consider arguments which were not properly raised at the first available opportunity. T.R.W. Inc. v. Andrews, - U.S. -, 122 S. Ct. 441, 443, - L. Ed. 2d - (2000); Berry v. Doles, 438 U.S. 190, 198, 98 S. Ct. 2692, 2697, 57 L. Ed.

2d 693 (1978). In this case, petitioner did not raise in the state intermediate appellate court any issue regarding the constitutionality of the state trial court's rulings on the post-trial motions. Further, in response to respondents' motion to dismiss filed in the state intermediate appellate court, petitioner made absolutely no argument that her due process rights would be violated if her appeal was dismissed. Similarly, it was not until the filing of her Petition in this case that petitioner ever framed her constitutional challenge on an alleged "conflict of decisions among the states" or on an alleged "protected property interest." Indeed, even when she for the first time raised a constitutional challenge in the Supreme Court of Ohio, petitioner only based her contention that her due process rights were violated on her "form" versus "substance" argument. As petitioner did not raise her constitutional challenges properly and as she is now attempting to base her challenges on arguments which she did not raise until she reached this court, her Petition for a Writ of Certiorari must be denied.

CONCLUSION

Respondents respectfully request that this court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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(3)

Supreme Court, U.S.
FILED
JUN 22 2002
CLERK

No. 01-851

IN THE

SUPREME COURT OF THE UNITED STATES

DEBORAH S. PALAC,

Petitioner,

v.

GARY R. SMITH and PRECISION ELECTRIC, INC.,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Ohio

PETITIONER'S REPLY MEMORANDUM

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8 pp

QUESTION PRESENTED

Whether the Due Process Clause of the Federal Constitution prohibits a state court from applying procedural rules in a manner that, without fair notice, deprives a plaintiff of her opportunity to appeal on a state law claim?

TABLE OF CONTENTS

Page

Question Presented i

Table of Contents ii

Table of Authorities iii

I. The United States Supreme Court has certiorari jurisdiction to review the state court's decision in this case 1

II. The Petitioner's case is of general importance for all states and has genuine constitutional significance 3

Conclusion 4

TABLE OF AUTHORITIES

Page(s)

CASES:

Charleston Fed. Sav. & Loan Ass'n v. Alderson, 324 U.S. 182 (1945) 3

Cohen v. Cowles Media Co., 501 U.S. 663 (1991) 1

Franks v. Delaware, 438 U.S. 154 (1978) 1

Malinski v. New York, 324 U.S. 401 (1945) 3

Orr v. Orr, 440 U.S. 268 (1979) 1

Payton v. New York, 445 U.S. 573 (1980) 2

Silver v. New York Stock Exch., 373 U.S. 341 (1925) 4

OTHER AUTHORITIES:

U.S. CONST. amend. XIV, § 1 3

I. The United States Supreme Court has certiorari jurisdiction to review the state court's decision in this case.

The Respondents, in their Brief in Opposition, have set forth an erroneous argument that the Petitioner's federal question has not been properly raised in the United States Supreme Court and that review must, therefore, be declined.

However, this Court has decided in a series of cases that as long as the highest state court holds or assumes that a specific federal question is properly before it, and then expressly proceeds to consider and determine that issue, the federal question is considered to have been properly preserved and raised for this Court's review. *Cohen v. Cowles Media Co.*, 501 U.S. 663, 667 (1991); *Orr v. Orr*, 440 U.S. 268, 274-75 (1979); *Franks v. Delaware*, 438 U.S. 154, 161-62 (1978).

The Petitioner specifically presented the question of whether her due process rights had been violated at pp. 10-11 of her Memorandum in Support of Jurisdiction filed and considered in the Supreme Court of Ohio. In her Proposition of Law No. 2 she stated that:

> A clearly captioned motion for remittitur, served within the time constraints of Civ. R. 59(B), cannot be judicially redacted to its termed "true nature" when such a construction operates to prejudice or eliminate the constitutional protection of due process of law provided under the Fourteenth Amendment, Section 1 of the Constitution . . . .

Furthermore, in the first paragraph thereunder, the Petitioner stated with particularity that:

> Citizens of the United States of America . . . are guaranteed the protection of due process of law. The Fourteenth Amendment of the Federal Constitution declares that no state shall deprive any person of life, liberty, or property without due process of law, and constitutes a limitation upon the powers of the states. . . . The appellant, however, was denied the protection of due process of law, as well as proper notice, when the court of appeals looked to what it termed the "true nature" of appellees' motion for remittitur and thereby dismissed appellant's notice of appeal as being untimely.

The Supreme Court of Ohio proceeded to dispose of this issue on the merits and determined that the appeal did not involve any substantial constitutional question. (App. 1a). Though unfavorable, this decision unquestionably preserved the certiorari jurisdiction of the United States Supreme Court. *Payton v. New York*, 445 U.S. 573, 582 n. 19 (1980).

In fact, the Respondents confirm that the Petitioner did present the precise question of whether her due process protections had been denied, and that that issue was decided in the highest state court. At pp. 4-5 of their Brief in Opposition, Respondents state:

> [T]he Supreme Court of Ohio was presented with petitioner's constitutional challenge to the decisions of the lower Ohio state courts. Ultimately, the Supreme Court of Ohio considered the very argument advanced by petitioner in this case and rejected that argument determining that no substantial constitutional question was presented.

> Although petitioner now cites different legal authority in support of her claim, that authority is really no different than what was considered by the Supreme Court of Ohio . . .
>
> .

Since it is clear that the highest state court has ruled on the Petitioner's federal question regarding her due process interest, any inquiry into when or how the question was raised in the lower state courts is irrelevant to the exercise of this Court's certiorari jurisdiction. An irrebuttable presumption has been created of a timely and properly raised federal question. *Charleston Fed. Sav. & Loan Ass'n v. Alderson*, 324 U.S. 182, 185-86 (1945).

II. The Petitioner's case is of general importance for all states and has genuine constitutional significance.

The Respondents take out of context the Petitioner's argument regarding the conflict of decisions among the states when utilizing a substance and form analysis, by stating that this is an illusory split and merely involves a question of how state court law is applied. This understanding misses the point.

The issue that the Petitioner seeks to apprise this Court of is a citizenry faced with inconsistent applications of state-by-state versions of substance and form analyses that may be used to rout established rules of civil and appellate procedure, and thereby confer lesser due process rights than that guaranteed by the Federal Constitution. U.S. CONST. amend. XIV, § 1.

It is significant that many, if not most, of the Bill of Rights' provisions are procedural in nature. This Court has stated that "[t]he history of American freedom is, in no small measure, the history of procedure." *Malinski v. New York*,

324 U.S. 401, 414 (1945) (separate opinion). Although procedural due process means different things in different instances, strict adherence to the standards of due process "often operates to prevent erroneous decisions on the merits from occurring." *Silver v. New York Stock Exch.*, 373 U.S. 341, 366 (1963).

Therefore, the legal issue presented in this case is one that has general importance for all states because all states have their own rendition of a substance and form analysis that can be applied in an ad hoc manner that affects whether people know when an interest of the Due Process Clause is triggered by different procedural rules.

CONCLUSION

This case presents a significant due process issue and plenary review of the action below is in order. The Petitioner respectfully requests that this Court grant a writ of certiorari to review the entry of the Supreme Court of Ohio.

Respectfully submitted,

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